BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JUSTIN B. GREENO Claimant VS. **COUNTY OF SUMNER, KANSAS** Respondent AND **KANSAS WORKERS RISK COOP FOR COUNTIES** Insurance Carrier	)	Docket No. 1,022,581

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the November 27, 2013, Review and Modification Award entered by Special Administrative Law Judge (SALJ) Jerry Shelor. The Board heard oral argument on March 19, 2014. Michael L. Snider of Wichita, Kansas, appeared for claimant. Jeffery R. Brewer of Wichita, Kansas, appeared for respondent.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The SALJ found claimant has sustained a 22.5 percent functional impairment by averaging the ratings of Drs. Murati and Hufford. The SALJ determined Dr. Smith's 2010 rating of claimant was outdated and was not considered. Further, the SALJ, relying upon the report of Dr. Hufford, found claimant capable of substantial, gainful employment, and thus has sustained a 93.5 percent work disability.

Respondent argues benefits payable for permanent partial disability are limited to payment for those weeks of disability existing within the 415-week period from after the

date of accident, as stated in *Ponder-Coppage*.[1] Respondent does not contest claimant is entitled to work disability payments from December 15, 2010, through January 11, 2013, the end of the 415-week period following the date of accident. Respondent argues the SALJ's Award in any amount greater than that which reflects the 415-week period is incorrect and in derogation of the law.

Claimant argues the SALJ erred as a matter of fact and law in relying solely upon the opinions of Dr. David Hufford, who is not a competent physical medicine and rehabilitation specialist. Claimant maintains the greater weight of the competent medical and vocational evidence proves he is realistically unemployable; therefore, claimant argues the SALJ's Award should be reversed and a 13.5 percent increase in functional impairment awarded, followed thereafter by a permanent total disability award.

The issues for the Board's review are:

1. Did claimant sustain a 13.5 percent increase in functional impairment followed by a permanent total disability award as a result of his work-related injuries beginning December 14, 2010?

2. Is claimant entitled to work disability benefits for permanent partial disability on this review and modification for any time period before claimant's last day of work on December 14, 2010?

3. Are claimant's work disability benefits limited to the period of time from after December 14, 2010, through on or about January 11, 2013, the 415-week period following claimant's January 18, 2005, accident date?

FINDINGS OF FACT

Claimant was employed with respondent as a welder and heavy equipment operator. On January 18, 2005, claimant injured his low back in a work-related accident. Claimant continued to work for respondent with no restrictions. On February 27, 2006, claimant entered into a Joint Agreed Award Settlement with respondent. The agreed award granted claimant a 7.5 percent functional impairment to the body as a whole, with future rights and defenses left open.

Claimant's last day of work for respondent was January 27, 2007. Following his employment with respondent, claimant worked similar heavy labor jobs with subsequent employers. Claimant received multiple epidurals for his continued back pain and eventually underwent a back fusion surgery on July 16, 2009, in Wyoming. Following claimant's additional symptomatology and treatment, a Joint Award on Review and

[1] *Ponder-Coppage v. State of Kansas*, 32 Kan.App.2d 196, 83 P.3d 1239 (2002).

Modification was entered on March 8, 2010. Claimant was awarded an additional 2.5 percent functional impairment to the body as a whole, giving claimant a total 10 percent permanent partial functional impairment to the body as a whole.

Following the fusion surgery, claimant stated he moved to Wichita, Kansas, to recuperate. Claimant was released by neurosurgeon Dr. Matthew Henry in December 2009, at which time claimant returned to unrestricted work with various employers. Claimant testified he continued to have constant worsening back pain following the 2009 fusion surgery, and he at times required assistance from coworkers to complete job tasks. Claimant stated his pain increased to the point where he could no longer work, and his overall last day of any employment was December 15, 2010.

Dr. Frederick Ray Smith, a physician specializing in physical medicine and rehabilitation, first examined claimant when he provided an independent medical evaluation and rating on January 7, 2010.[2] Claimant returned to Dr. Smith on January 27, 2011, after treating conservatively with Dr. Henry with medication, epidurals, and physical therapy for ongoing low back pain. According to Dr. Henry, claimant was not a candidate for any further surgery. Dr. Smith assessed claimant with failed back syndrome with no radicular symptoms and recommended he discontinue physical therapy. Dr. Smith continued the restrictions imposed on claimant by Dr. Henry: light duty work, no lifting over 20 pounds, frequent lifting and carrying of objects up to 10 pounds, and walking, standing, and sitting allowed without restrictions.

Claimant continued to follow up with Dr. Smith and was referred to Dr. Green in March 2011 for a facet block trial, which did not provide relief. Claimant returned to Dr. Green in April 2011 for a spinal cord stimulator trial. Dr. Smith explained "the wires came in contact with the nerve or spinal cord and the device was withdrawn."[3] Claimant then underwent a work hardening program, therapy, and a functional capacity evaluation (FCE). The FCE demonstrated some limits on claimant's ability to stand, sit, and move. Dr. Smith imposed permanent work restrictions on July 11, 2011, based on the FCE results:

> [Claimant] is only able to work 4-hour days. Only sit for 4 hours 50 minutes at a time. Stand for 2 hours 20 minutes at a time and walk for 3 to 4 hours occasional moderate distances. Lifting above shoulder and desk chair was around 40 pounds. However, a chair floor was only about 15 pounds. Push, pull about 60 pounds. Carrying was around 32 pounds. Those are all occasional with, of course, lesser amounts for frequent. He is only able to bend, stoop, climb stairs, crawl, or crouch

[2] Dr. Smith provided the additional 2.5 percent functional impairment rating awarded to claimant on March 8, 2010.

[3] Smith Depo., Ex. 2 at 7.

> minimally to occasionally. He can occasionally use either foot. . . . He can only minimally occasionally kneel or squat.[4]

Dr. Smith released claimant at maximum medical improvement on July 11, 2011. Dr. Smith noted claimant would be unable to return to any meaningful employment due to his permanent work restrictions. Claimant continued to treat with Dr. Smith for pain management until he moved to Wellington, Kansas, in April 2013.

Dr. Pedro A. Murati, a board certified physiatrist, examined claimant at his counsel's request on January 22, 2013, for purposes of an independent medical evaluation. Claimant presented with constant low back pain and difficulty bending, twisting, sitting, standing, and walking due to low back pain. After reviewing claimant's history, medical records, and performing a physical examination, Dr. Murati diagnosed claimant with status post apparent two level transforaminal lumbar interbody fusion at L3-4 and L4-5 on July 15, 2009, status post dual lead spinal cord stimulator trial, and bilateral sacroiliac joint dysfunction. Dr. Murati indicated claimant's diagnoses are within all reasonable medical probability a direct result from the January 18, 2005, work-related injury.

Dr. Murati imposed restrictions on claimant based on a four-hour work day and noted, "This claimant is essentially and realistically unemployable and I recommend he apply for social security disability benefits."[5] Dr. Murati recommended consideration of a future fusion above and below claimant's existing fusion and chronic pain management.

Using the AMA *Guides*,[6] Dr. Murati testified claimant has a 17 percent increase over his preexisting 10 percent permanent partial functional impairment to the body as a whole based on claimant's back fusion and findings of radiculopathy. Dr. Murati opined the increase was a natural and probable result of claimant's spinal fusion surgery, and claimant's overall rating was now 25 percent permanent partial impairment to the whole body.

Dr. David W. Hufford, a board certified physician, performed an independent medical evaluation of claimant at respondent's request on June 4, 2013. Claimant complained to Dr. Hufford of axial low back pain which does not radiate into the legs, and considerable weight gain since his 2005 injury. Dr. Hufford also reviewed claimant's history, medical records, and performed a physical examination, concluding claimant sustained a work-related low back injury, status post two level lumbar fusion with failed back syndrome. Dr. Hufford indicated claimant was at maximum medical improvement and

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[4] *Id*.

[5] Murati Depo., Ex. 2 at 6.

[6] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

recommended he be permanently restricted to sedentary work. Dr. Hufford opined claimant was capable of performing substantial, gainful employment within the physical limitations of the sedentary level of work. Dr. Hufford did not take into consideration claimant's education or other factors.

Dr. Hufford found no evidence of radiculopathy in claimant's lower extremities, and he testified based upon the AMA *Guides*:

> My opinion was that resulting from the fusion [claimant has] a 20 percent whole person impairment in the DRE category IV . . . . He had previously received impairment ratings with a cumulative 10 percent whole person impairment; so the resulting apportionment gave him an additional 10 percent impairment as a result of the lumbar fusion allowing for the preexisting impairment prior to the surgery.[7]

Dr. Hufford noted, "[Claimant] has had a failed attempt at a spinal cord simulator and there are generally no other pain interventions of the procedural nature that have any prospect of lessening his pain in this setting."[8] In Dr. Hufford's opinion, claimant requires chronic long-term pain management.

Doug Lindahl, a certified vocational rehabilitation counselor and job specialist, interviewed claimant via telephone at his counsel's request. In a report generated March 18, 2013, Mr. Lindahl recorded claimant's educational and work history. Claimant completed the 11th grade and subsequently earned a GED. He completed some vocational training in auto mechanics and auto body, though he did not finish all courses. Claimant has primarily performed medium to heavy labor work in the 15-year period prior to his 2005 accident.

Claimant remained unemployed at the time of the interview with Mr. Lindahl. Mr. Lindahl reported claimant had applied for Social Security Disability and was at that time appealing the initial denial. After reviewing the medical records and restrictions of Drs. Murati and Smith, Mr. Lindahl opined claimant was realistically unemployable based upon said restrictions. It was Mr. Lindahl's understanding morbid obesity and chronic pain from failed back syndrome were the primary bases for claimant's limitations.

Mr. Lindahl generated a list of work tasks claimant performed in the 15-year period prior to the 2005 accident. Dr. Hufford reviewed the task list prepared by Mr. Lindahl. Of the 23 unduplicated tasks on the list, Dr. Hufford opined claimant was unable to perform 20, for an 87 percent task loss.

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[7] Hufford Depo. at 7-8.

[8] *Id.*, Ex. 2 at 2.

Claimant testified he has been unable to find a doctor in Wellington, Kansas, to take over his pain management. Claimant stated he is unable to perform any substantial labor requiring lifting and bending and therefore has not worked since December 2010. Claimant testified he has suffered no other injuries to his back since the 2005 incident.

PRINCIPLES OF LAW

The Workers Compensation Act places the burden of proof upon the claimant to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the conditions on which that right depends.[9] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[10]

Permanent total disability exists when an employee, on account of his or her work-related injury, has been rendered completely and permanently incapable of engaging in any type of substantial, gainful employment.[11] An injured worker is permanently and totally disabled when rendered "essentially and realistically unemployable."[12]

K.S.A. 44–528(d) (Furse 2000) states:

> Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

K.S.A. 44–510e(a) (Furse 2000) states, in part:

> In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44–528 and amendments thereto.

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[9] K.S.A. 2004 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[10] K.S.A. 2004 Supp. 44-508(g).

[11] K.S.A. 44-510c(a)(2) (Furse 2000).

[12] *Wardlow v. ANR Freight Systems,* 19 Kan.App.2d 110, 872 P.2d 299 (1993).

ANALYSIS

1. Did claimant sustain a 13.5 percent increase in functional impairment followed by a permanent total disability award as a result of his work-related injuries beginning December 14, 2010?

In 2010, respondent agreed in writing claimant had an increase in his functional impairment related to his original injury between February 27, 2006, and March 8, 2010. No objection was made suggesting the increase was in any way related to the heavy manual labor performed by claimant with several employers from 2008 to 2010. In its cross examination of Dr. Smith, respondent suggested the work activities from 2008 to 2010 were the cause of claimant's increased disability. This argument is without foundation and inconsistent with the Joint Agreed Award entered between the parties in 2010.

In the Award, the SALJ relied solely on the opinions of Dr. Hufford in determining if claimant had a work disability. The SALJ made a finding that Dr. Smith's impairment rating is out of date. Notwithstanding Dr. Smith's rating relating to an examination in 2010, Dr. Smith treated claimant before the March 8, 2010, Joint Award on Review and Modification through January 2013. As such, Dr. Smith's opinions should be given greater weight than either Dr. Hufford or Dr. Murati regarding claimant's ability to function.

There is little doubt claimant has suffered an increase in his functional impairment. Dr. Hufford opined claimant experienced an increase of 10 percent over the previous 10 percent. Dr. Murati testified claimant had a 17 percent increase in his impairment over the 10 percent impairment that provided the basis for the March 8, 2010, Joint Award on Review and Modification.

The only dispute seems to be whether claimant suffered a decrease in his ability to function rendering him essentially and realistically unemployable. At some point between March and July 2011, claimant underwent an FCE that resulted in the implementation of severe restrictions by Dr. Smith. In his notes dated July 11, 2011, Dr. Smith wrote that based upon the FCE claimant would not be able to go back to any kind of meaningful employment.

Mr. Lindahl, the only vocational expert of record, testified claimant was not employable using Dr. Smith's restrictions. In his report, Mr. Lindahl wrote "there is no full time work in the open labor market that this individual can do . . . ."[13] *Wardlow* tells us finding a claimant permanently and totally disabled because they are essentially and

[13] Lindahl Depo., Ex. 2 at 3.

realistically unemployable is compatible with legislative intent.[14] Based upon the opinions of Dr. Smith and Mr. Lindahl, claimant is essentially and realistically unemployable, and thus permanently and totally disabled within the meaning of K.S.A. 44-510c(a)(2).

2. Is claimant entitled to work disability benefits for permanent partial disability on this review and modification for any time period before claimant's last day of work on December 14, 2010?

K.S.A. 44–528(d) clearly states the effective date of a modified award is six months before the date the application for review and modification was filed. The Application to review and modify the underlying award in this claim was filed on December 12, 2012. Six months prior to filing the application is June 12, 2012. Claimant is not entitled to benefits under an order for modification by the Board for any period prior to June 12, 2012. December 14, 2010, was the point in time at which claimant's circumstances had changed, entitling claimant to request a modification of the preceding award.

In *Ponder-Coppage*, the Board analyzed the effective date of modification and stated:

> However, the effective date of the modification award becomes April 12, 1998, because that is six months prior to the date claimant's application for review and modification was filed. There can be only one "effective date." The two dates referred to in K.S.A. 44-528(d) (1993 Furse) must agree. Accordingly, by operation of that statute, the "effective date" of claimant's work disability becomes April 12, 1998.[15]

3. Are claimant's work disability benefits limited to the period of time from after December 14, 2010, through on or about January 11, 2013, the 415-week period following claimant's January 18, 2005, accident date?

While this issue has been rendered moot by our finding claimant permanently and totally disabled, we will address this issue. K.S.A. 44–510e(a) sets forth the number of weeks compensation is received but limits that compensation to 415 weeks from the date of the work-related accident.[16] In *Ponder–Coppage*, the Court of Appeals held K.S.A. 44–510e(a) is a statute of limitations, which limits a claimant seeking a review and

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[14] 19 Kan.App.2d at 113.

[15] *Ponder-Coppage v. State of Kansas*, No. 210,809, 2002 WL 230930 (Kan. WCAB Jan. 31, 2002); *aff'd*, 32 Kan.App.2d 196, 83 P.3d 1239 (2002).

[16] 32 Kan.App.2d at 200.

modification to 415 weeks of compensation calculated from the date of the work-related accident.[17]

In this case the 415 week period ended on January 11, 2013. The claimant is not entitled to permanent partial disability benefits beyond that date.

CONCLUSION

Claimant is permanently and totally disabled as the result of his work related accident on January 18, 2005. Claimant is entitled to benefits for permanent total disability commencing June 12, 2012, six months prior to the date the Application for review and modification was filed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated November 27, 2013, is modified to reflect claimant is permanently and totally disabled as the result of his injury.

Claimant is entitled to permanent total disability compensation at the rate of $449.00 per week for a permanent total disability, not to exceed $125,000.00, less amounts previously paid for permanent partial disability and temporary total disability. Benefits for permanent total disability commence June 12, 2012.

As of April 16, 2014, there would be due and owing to the claimant 96.14 weeks of permanent total disability compensation at the rate of $449.00 per week in the sum of $43,166.86 for a total due and owing of $43,166.86, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance shall be paid at $449.00 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

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[17] *Camp v. Bourbon County*, No. 104,784, 281 P.3d 597 (Kansas Court of Appeals unpublished opinion filed July 27, 2012; *rev. denied* Sep. 4, 2013).

Dated this _____ day of April 2014.

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BOARD MEMBER

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BOARD MEMBER

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